

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 11, 2009

**STACY LEE HARRIS v. CHARLEY NICOLE BIRDWELL**

**Appeal from the Juvenile Court for Robertson County**  
**No. D-20700     Thomas Maynard, Judge**

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**No. M2009-01333-COA-R3-JV - Filed January 19, 2010**

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Father filed a petition to modify the parties' residential parenting schedule and to hold Mother in contempt of court. Following a hearing the trial court determined that, notwithstanding the fact that Father had not shown a material change of circumstance as alleged in his petition, a material change of circumstance existed and the court accordingly made modifications to the plan. The court declined to hold Mother in contempt. Mother appeals the action of the trial court modifying the residential parenting plan. Father appeals the trial court's finding that he did not show a material change of circumstance and failure to hold Mother in contempt. Finding the record supports the action of the trial court, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Fletcher W. Long, Springfield, Tennessee, for the appellant, Charley Nicole Birdwell.

Jennifer Sheppard, Nashville, Tennessee, for the appellee, Stacy Lee Harris.

## MEMORANDUM OPINION<sup>1</sup>

The parties to this action are the parents of a child (“J.A.B.”) born out of wedlock on August 1, 2000. Shortly after the birth of J.A.B., Mother filed a petition seeking to legitimate her and set support; Father sought visitation. Following a hearing on May 4, 2001, the trial court entered an order, *inter alia*, designating Mother as primary residential parent, granting Father residential parenting time on alternating weekends and holidays, and setting child support. Mother and Father had difficulty implementing the order and each party, at various times, sought to modify it and/or to have the other held in contempt.<sup>2</sup>

The present appeal stems from a petition filed by Father on March 12, 2008, seeking modification of the parenting schedule and to hold Mother in contempt; the petition was subsequently amended. Mother filed her answer to the petition, as amended, denying any contemptuous acts and that there was a material change of circumstance such as to warrant modification of the parenting plan; Mother acknowledged, however, that “a more specific parenting plan reflecting the current order of residential time would be beneficial for the parties.”

A hearing was held on March 19, 2009. At the close of Father’s proof, Mother moved for an involuntary dismissal on the ground that Father had not shown a material change of circumstance. In ruling on the motion, the court stated in part:

I am partially going to grant the motion for directed verdict. I do find that the Petitioner has not demonstrated that there has been a material change of circumstances on the grounds as stated in the Petition; however, the Court does take Judicial Notice that the age of the child has increased and that the age of the child does warrant a material change in circumstances and the modification of that.

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<sup>1</sup> Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

<sup>2</sup> The parties were previously before this court on Father’s appeal of the denial of his petition to change primary custody of J.A.B. from Mother to him; the decision of the trial court was affirmed. *See Birdwell v. Harris*, No. M2006-01919-COA-R3-JV, 2007 WL 4523119 (Tenn. Ct. App. Dec. 20, 2007).

The Court is of the opinion that the child's relationship with her half siblings does warrant more time with the father.<sup>3</sup>

The court proceeded to specify certain modifications to the parenting schedule, *inter alia*, granting Father an additional two weeks residential parenting time in the summer months.

Mother appeals, raising the following issues:

1. Whether the Trial Court erred in granting a modification of the previous parenting schedule order once finding that the petitioner did not carry his burden of proving by a preponderance of the evidence that there had been no material change in circumstances since the entry of the last order.
2. Whether the Trial Court erred and abused its discretion when it ordered a modification of the previous parenting schedule order after finding that Plaintiff/Appellant's motion for involuntary dismissal was well taken and dismissing the Defendant/Appellee's petition.
3. Whether the Trial Court properly took judicial notice of the child's age increasing as a material change in circumstances sufficient to change the existing and previous parenting schedule absent a specific finding that that [sic] such a material change in circumstances affected the child's well being.

Father raises the following additional issues:

1. Whether the Trial Court erred in its determination that there had not been a material change in circumstances as stated in the Petition and thereby partially granting the appellant's Motion for Directed Verdict.
2. Whether the Trial Court erred in its failure to rule on Appellee's Petition for Contempt against Appellant.
3. Whether Appellee is entitled to recover attorney fees associated with this appeal.

### **Analysis**

A valid custody order or residential placement schedule, once entered by the court, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). Such an order remains within the

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<sup>3</sup> After the entry of the original order setting residential parenting time, Father had married and, at the time of these proceedings, had two children, ages five and two and one-half, from that union.

control of the court, however, and is subject to “such changes or modification as the exigencies of the case may require.” Tenn. Code Ann. § 36-6-101(a)(1).

In recognition of the fact that the circumstances of children and their parents change, which sometimes require changes in the existing parenting arrangement, both the legislature and the courts have addressed the requirements necessary to modify a residential parenting schedule. There are no bright line rules, but the Tennessee Supreme Court has directed courts to consider: (1) whether the change occurred after the entry of the order sought to be modified; (2) whether the change was known or reasonably anticipated when the order was entered; and (3) whether the change is one that affects the child’s well-being in a meaningful way. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003) (citing *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002)). The General Assembly has provided a non-exhaustive list of circumstances which might constitute a material change for purposes of modifying a residential parenting schedule, including “significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.” Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C).

The threshold issue in modification proceedings is whether a material change in circumstances affecting the child’s best interest has occurred since the adoption of the existing parenting plan. See Tenn. Code Ann. § 36-6-101(a)(2)(B); see also *Kendrick*, 90 S.W.3d at 570. The petitioner bears the burden of proof. Tenn. Code Ann. § 36-6-101(a)(2)(B). If the petitioner fails to establish the threshold issue, that a material change of circumstances has occurred, the petition is to be denied and modification is not to be considered.<sup>4</sup> See *Kendrick*, 90 S.W.3d at 570; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006); *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999). Whether a preponderance of the evidence shows that a material change in circumstances has occurred since the entry of the final divorce decree is a question of law, which we review *de novo* without a presumption of correctness. *Kendrick*, 90 S.W.3d at 569-70; *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). We review the trial court’s findings of fact *de novo* upon the record, accompanied by a

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<sup>4</sup> If a material change in circumstances has occurred, it must then be determined whether modification of the plan is in the child’s best interests. *Marlow v. Parkinson*, 236 S.W.3d 744, 749 (Tenn. Ct. App. 2007) (citing *Kendrick*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). If it is not proven that a material change in circumstances has occurred, the petition is to be denied. See *Blair*, 77 S.W.3d at 151 (affirming the judgment of the trial court not to grant the petition to modify the previous custody order based upon the trial court’s finding that the evidence failed to show the existence of a material change in circumstances).

presumption of correctness, unless the preponderance of the evidence is otherwise. *Kendrick*, 90 S.W.3d at 569; *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990).

The trial court held that the increase in J.A.B.'s age since the order establishing the parenting schedule was entered, the fact that she now had half-siblings, and the parents' difficulties in implementing the parenting schedule, constituted a material change of circumstance and modified the schedule accordingly. Mother contends that the trial court lacked authority to modify the schedule once it found that Father had not established a material change of circumstances and dismissed his petition. Father responds by asserting that the trial court erred in determining that there had not been a material change in circumstance and, thereby, in partially granting Mother's motion for directed verdict. We have reviewed the allegations of the pleadings and the evidence of record and conclude that the court did not err in its determination that the increased age of J.A.B., along with various other factors including the fact that, since the entry of the original order establishing the parenting schedule, she had acquired two siblings, were material changes which justified the court's revision of the parenting schedule.

In determining whether a material change of circumstances exists for purposes of modifying a residential parenting schedule, Tenn. Code Ann. § 36-6-101(a)(2)(C) provides that the age of the child, along with "other circumstances" are factors that may be considered. The threshold to find a material change in circumstance requires only that we look to see whether a change has affected the well-being of the child in some way. In addition to the factors expressly set forth in the statute, the threshold may be reached by showing that the existing arrangement has proven unworkable for the parties. *See Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at \*2 n.3 (Tenn. Ct. App. Aug. 18, 2006); *Rushing v. Rushing*, No. W2003-01413-COA-R3-CV, 2004 WL 2439309, at \*6 (Tenn. Ct. App. Oct. 27, 2004); *Turner v. Purvis*, No. M2002-00023-COA-R3-CV, 2003 WL 1826223, at \*4 (Tenn. Ct. App. Apr. 9, 2003); *Vaccarella v. Vaccarella*, 49 S.W.3d 307, 318 (Tenn. Ct. App. 2001).

As noted when this case was before us previously, "failures to adhere to an order of custody and visitation may . . . be found to be a material change in circumstance." *Birdwell*, 2007 WL 4523119 at \*6 (citing Tenn. Code Ann. § 36-6-101(a)(2)(B)). The circumstances alleged to be a material change must "'affect the child's well-being in a material way'" *id.* (citing *Cranston*, 106 S.W.3d at 644), and the failure to comply with the order must be such that the existing arrangement is no longer in the best interest of the child. *Id.* The record is clear that Mother and Father had difficulty in implementing the parenting schedule, particularly with reference to pick-up and delivery times and telephone calls, as well as

activities in which J.A.B. was involved which took place during Father's parenting time.<sup>5</sup> The plan had not worked as originally intended, although the difficulties were not as egregious as Father contended or as innocuous as Mother asserted. Those difficulties prompted the court to specify dates and exact times when parenting time would be exercised, an action which, according to her answer, Mother supported.

Other difficulties with the existing plan, particularly those which impacted Father's parenting time, were brought about as a result of the child's getting older and her being increasingly involved in extracurricular activities, particularly soccer. Father testified that the fact that many of J.A.B.'s games, which Mother also attended, were played during his parenting time caused conflict with Mother; on one occasion the police were called to intervene between Father and Mother. Father also testified that Mother would schedule activities for J.A.B., such as visiting schoolmates, on weekends when his parenting time was to occur. These difficulties were the sort of circumstances brought about by the change in J.A.B.'s age, and Mother's and Father's difficulty in adjusting their conduct to accommodate J.A.B.'s activities, which made a change in the parenting schedule in J.A.B.'s best interest, as contemplated by Tenn. Code Ann. § 36-6-101(a)(2)(C).

The fact that since the entry of the parenting plan, as a result of Father's marriage, J.A.B. had two siblings is a "change[] in the parent's living . . . condition that significantly affect[s] parenting." Tenn. Code Ann. § 36-6-101(a)(2)(C). Father testified that it was difficult for J.A.B. to develop a relationship with her younger siblings with visitation every other weekend and that all of the children desired more time with her. The court's finding that J.A.B.'s relationship with her half-siblings warranted additional time with Father is supported by the record and the modification which granted Father an additional two weeks during the summer was an extremely modest one.<sup>6</sup>

Mother's contention that the trial court lacked authority to change the parenting schedule is premised upon her belief that the court found that no material change of

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<sup>5</sup> Father contended that Mother's interference with his parenting time including scheduling activities for J.A.B. during Father's parenting times which resulted in a lack of relationship between Father and J.A.B. and constituted a change of circumstance.

<sup>6</sup> The court noted:

There is a material change of circumstance regarding her age and her relationship with the other half of this equation, which is the other half of her family. She does have a father, she does have half siblings. She has reached an age that she needs to have a relationship with the other half of her family. That's why the court has ordered the specifics that are contained in this parenting plan, okay?

circumstance existed. While the court held Father had not established a material change of circumstance as alleged in the petition, the record does not preponderate against the court's determination that a material change of circumstances affecting J.A.B.'s well-being was shown.

Father asserts that the trial court erred in not addressing his petition seeking to hold Mother in contempt. The petition included allegations that Mother did not adhere to the visitation schedule set forth in the parenting plan in various particulars and that she otherwise interfered with his exercise of parenting time; that she interfered with his telephone contact with J.A.B.; and that Mother spoke negatively of him to J.A.B. The petition also included the following factual allegation:

10. Father would submit that the parties are in dire need of a much more detailed Parenting Order. Specifically, Father would submit that the parties would greatly benefit from a Parenting Plan that specifies exact times and dates for holidays and vacation time.<sup>7</sup>

The record shows that, while discussing the case with counsel prior to commencing the taking of proof, the court stated as follows:

I will say this and I hate to interrupt you [counsel for Mother], but I didn't hear anything about contempt [in Father's counsel's opening statement] and I don't know if that is still part of your client's pursuit this afternoon is – is the contempt charges – the allegations that are contained in the Petition and Amended Petition are still being pursued and, if so, there will have to be some showing or evidence that the mother intentionally meant to violate this order. And we have a very vague order, very ambiguous order, so I don't want to say that you have an impossible task, but I think you have a difficult task to show contempt in this case.

There are four essential elements of a contemptuous violation of a court order or command. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346 (Tenn. 2008). The order alleged to have been violated must be "lawful," the order alleged to have been violated must be "specific and unambiguous," the person alleged to have violated the order must have actually disobeyed the order, and that person's violation of the order must have been "willful." *Id.* at 354-55.

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<sup>7</sup> Mother's answer to this allegation was: "Mother would agree that a more specific parenting plan reflecting the current order of residential time would be beneficial for the parties."

We have reviewed the record and determined that the proof does not show such wilful disobedience to the court's order as would sustain a finding of contempt. Initially, we note that the parties as well as the court noted the ambiguity of the existing parenting plan and the problems caused by such ambiguity. We also note that the proof introduced by Father failed to show Mother's actual and intentional disobedience to the order, as opposed to what was clearly dissatisfaction with having to accommodate Father's visitation rights under the parenting plan. The trial court was in a unique position to gauge the subtleties of demeanor and credibility that often define the line between obstinance and contempt and we do not substitute our judgment for that of the trial court that Mother's actions did not constitute wilful contempt of court.<sup>8</sup>

As a final matter, Father seeks to recover attorney's fees associated with this appeal pursuant to Tenn. Code Ann. § 36-5-103(c), which provides:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

The decision to award a party his or her attorney's fees on appeal rests solely within the discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995).

In the exercise of our discretion we have determined that an award of counsel fees to Father would not be appropriate. Consequently, the request is denied.

For the foregoing reasons, the judgment of the trial court is AFFIRMED and the case is remanded to the Juvenile Court for Robertson County for such further proceedings as may be necessary.

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<sup>8</sup> We note also that the record shows that a finding that Mother was in contempt of court was not vigorously pursued by Father. For instance, Father made no mention of contempt in his summation and did not raise the issue in the Motion to Alter or Amend and Amended Motion to Alter or Amend.



Cost of this appeal are taxed equally between the parties.

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RICHARD H. DINKINS, JUDGE